1 2 3 4 5 6 7 UNITED STATES DISTRICT COURT 8 EASTERN DISTRICT OF CALIFORNIA 9 10 11 LEONARD A. SLAVEN, Case No.: 1:20-cv-00606-JLT (HC) 12 Petitioner, ORDER DIRECTING CLERK OF COURT TO ASSIGN DISTRICT JUDGE 13 v. FINDINGS AND RECOMMENDATION TO 14 THE PEOPLE OF THE STATE OF DISMISS UNEXHAUSTED PETITION CALIFORNIA, 15 [THIRTY-DAY OBJECTION DEADLINE] Respondent. 16 17 On April 29, 2020, Petitioner filed the instant petition for writ of habeas corpus in this Court. 18 (Doc. 1.) Because the petition appears to be unexhausted, the Court will recommend it be 19 SUMMARILY DISMISSED without prejudice. 20 21 DISCUSSION Preliminary Review of Petition 22 Rule 4 of the Rules Governing Section 2254 Cases requires the Court to make a preliminary 23 review of each petition for writ of habeas corpus. The Court must summarily dismiss a petition "[i]f it 24 plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in 25 the district court . . . . " Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990). The Advisory 26 Committee Notes to Rule 8 indicate that the Court may dismiss a petition for writ of habeas corpus, 27

either on its own motion under Rule 4, pursuant to the respondent's motion to dismiss, or after an

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answer to the petition has been filed.

## B. Failure to Name a Proper Respondent

Petitioner fails to name the proper respondent. A petitioner seeking habeas corpus relief under 28 U.S.C. § 2254 must name the state officer having custody of him as the respondent to the petition. Rule 2(a) of the Rules Governing § 2254 Cases; Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). Normally, the person having custody of an incarcerated petitioner is the warden of the prison in which the petitioner is incarcerated because the warden has "day-to-day control over" the petitioner. Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992); see also Stanley, 21 F.3d at 360. However, the chief officer in charge of state penal institutions is also appropriate. Ortiz, 81 F.3d at 894; Stanley, 21 F.3d at 360. Where a petitioner is on probation or parole, the proper respondent is his probation or parole officer and the official in charge of the parole or probation agency or state correctional agency. Id. Petitioner's failure to name a proper respondent requires dismissal of his habeas petition for lack of jurisdiction. Stanley, 21 F.3d at 360; Olson v. California Adult Auth., 423 F.2d 1326, 1326 (9th Cir. 1970); see also Billiteri v. United States Bd. Of Parole, 541 F.2d 938, 948 (2nd Cir. 1976).

## C. Exhaustion

A petitioner who is in state custody and wishes to collaterally challenge his conviction by a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court the initial opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982).

A petitioner can satisfy the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider each claim before presenting it to the federal court. <u>Duncan v. Henry</u>, 513 U.S. 364, 365 (1995). A federal court will find that the highest state court was given a full and fair opportunity to hear a claim if the petitioner has presented the highest state court with the claim's factual and legal basis. <u>Duncan</u>, 513 U.S. at 365 (legal basis); <u>Kenney v. Tamayo-Reyes</u>, 504 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

Petitioner indicates that he appealed to the California Court of Appeal, Fifth Appellate District,

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1	however he fails to indicate whether he sought relief in the highest state court. (See Doc. 1 at 2.)
2	Because Petitioner has not presented his claims for federal relief to the California Supreme Court, the
3	Court must dismiss the petition. See Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006);
4	Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001); Calderon v. United States Dist. Court, 107 F.3d
5	756, 760 (9th Cir. 1997) (en banc); <u>Greenawalt v. Stewart</u> , 105 F.3d 1268, 1273 (9th Cir. 1997). The
6	Court cannot consider a petition that is entirely unexhausted. Rose, 455 U.S. at 521-22; Calderon, 107
7	F.3d at 760. Therefore, the petition must be dismissed for lack of exhaustion.
8	ORDER
9	The Court DIRECTS the Clerk of Court to assign a district judge to the case.
10	RECOMMENDATION
11	Accordingly, the Court RECOMMENDS that the habeas corpus petition be SUMMARILY
12	DISMISSED without prejudice for lack of jurisdiction.
13	This Findings and Recommendation is submitted to the United States District Court Judge
14	assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the
15	Local Rules of Practice for the United States District Court, Eastern District of California. Within
16	thirty days after being served with a copy, Petitioner may file written objections with the Court. Such
17	a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation."
18	The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C).
19	Failure to file objections within the specified time may waive the right to appeal the District Court's
20	order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).
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22	IT IS SO ORDERED.
23	Dated: May 18, 2020 /s/ Jennifer L. Thurston
24	UNITED STATES MAGISTRATE JUDGE
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27	<sup>1</sup> The Court has reviewed the docket of the California Supreme Court and there is no entry indicating sought relief in that

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court in any habeas corpus matter. The Court may take judicial notice of sources whose accuracy cannot be reasonably disputed (Fed.R.Evid. 201(b)(2)). Thus, the Court takes judicial notice of the on-line docket of the California Supreme Court.